No. 20811

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK GOODMAN, PARAMOUNT ICE CREAM CORP. and FRIGID PROCESS CO.,

Appellants,

vs.

UNITED STATES OF AMERICA, et al.,

Appellees.

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

Appellants will utilize their opportunity to file this Reply Brief by analyzing and refuting appellees' arguments as set forth in the Brief for the appellees (hereinafter "Appellees' Brief") and by summarizing appellants' various arguments.

I

JURISDICTION

A. The District Court Had Jurisdiction.

Appellees suggest that it would have been

proper for the District Court to have dismissed the present action on the grounds of prematurity. Not only is this contention irrelevant to these proceedings, but the authorities cited by appellees are either dictum, (Hill v. United States, 346 F.2d 175 (9th Cir. 1965)), inapplicable and distinguishable (Reisman v. Caplin, 375 U.S. 440, 13 AFTR 2d 457 (1964)), or sufficiently indefinite so as to deprive the case of any precedent value (Gentilli v. Caplin, D.C. Cir., decided March 3, 1964 (64-2 U.S.T.C. ¶9779)).

To the contrary, there is substantial authority to the effect that a motion to suppress may be brought prior to indictment. See e.g., DiBella v. United States, 369 U.S. 121 (1962); Go-Bart Importing Co. v. United States, 382 U.S. 344, 355 (1931); Hoffritz v. United States, 240 F.2d 109 (9th Cir. 1956); In Re Fried, 161 F.2d 453, 458-459 (2d Cir. 1947); Smith v. Katzenbach, 351 F.2d 810 (D.C. Cir. 1965).

B. The Judgment Of The District Court Is A Final, Appealable Order.

Appellees argue that the decisions in Hill and DiBella bar this appeal. A careful examination of these decisions and the factual distinctions between them and the case presently before this Court establishes that the judgment of the district court was a final, appealable order.

Prior to DiBella, there were many cases holding that preindictment motions seeking the return of property unlawfully obtained and its suppression as evidence in any future criminal proceeding were appealable. See, e.g., Perlman v. United States, 247 U.S. 7 (1917); Burdeau v. McDowell, 256 U.S. 465 (1920); Lapides v. United States, 215 F.2d 253, 254-55 (2d Cir. 1954); In Re Fried, supra; In Re Sana Laboratories, 115 F.2d 717, 718 (3rd Cir. 1940); Dowling v. Collins, 10 F.2d 62 (6th Cir. 1926). This same principle was followed in this Circuit. In United States v. Rosenwasser, 145 F.2d 1015, 1016-17 (9th Cir. 1944), this Court stated that:

> "Where no criminal action against him is pending at the time the moving party institutes a proceeding to suppress evidence, the proceeding is considered an independent suit in equity and the court's order therein is appealable as a final decision."

See also, Weldon v. United States, 196 F.2d 874, 875 (9th Cir. 1952); Freeman v. United States, 160 F.2d 69 (9th Cir. 1946).

In DiBella, the Supreme Court's primary consideration was the distinction between motions for the suppression of evidence which were made while there was a criminal prosecution in esse and independent ci[illegible]

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proceedings seeking the return of illegally seized property which were instituted while there was no criminal prosecution in esse. After examining the policy considerations against allowing appeals during the course of criminal proceedings, the Supreme Court formulated the following standard:

> "When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment--in each such case the order on a suppression motion must be treated as 'but a step in the criminal case preliminary to the trial thereof.'" 369 U.S. at 131. (Emphasis supplied.)

In the absence of all of the above factors, it must logically follow that there is no prosecution in esse and hence, an independent proceeding.

In order to assist in the determination of whether the proceeding was an independent proceeding, the Supreme Court, in addition to its requirement that there be no criminal prosecution in esse, imposed a further requirement that the motion seek solely the return of property as distinguished from the suppression of evidence.

In Hill, this Court approved the following paraphrasing of DiBella:

> "'DiBella requires both a request for return of property and independence from

the criminal case before the order denying return becomes appealable.'"

(Emphasis in original.) 346 F.2d at 178.

Although the facts in Hill clearly established "independence from the criminal case", i.e., no prosecution in esse, this Court held that since all of Dr. Hill's books and records had been returned, the motion constituted merely a motion to suppress and, as such, did not meet the requirements of DiBella.

In the instant case, appellants' independent civil action, which was commenced before the initiation of any criminal proceedings, was brought as an action seeking return of all property which was unlawfully taken. The fact that the originals of the books, records and other documents were returned (after the commencement of these proceedings) does not constitute a return of all of appellants' property since extensive copies were made without appellants' knowledgeable approval while the books, records and other documents were in the possession of the government agents. That these copies constitute the property of appellants and are recoverable by them cannot be questioned. As Judge Learned Hand stated in United States v. Kraus, 270 Fed. 578, 580 (S.D.N.Y. 1921):

"The law in cases of unlawful searches is now well settled . . . .When seized they [the documents] must be returned, with them

all copies taken while the officers retained their illegal possession." (Emphasis supplied.)

And in Rosenwasser, this Court stated, at 1017-18:

> "'The essence of a provisions forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.' We think the same theory applies to that part of the order in the instant case requiring the officers and agents of the Wage and Hour Division to return any copies or information obtained from the property illegally seized and requiring the United States to refrain from using any data so obtained." (Emphasis supplied.)

See also Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Although the Court in Hill discussed the effect of the copies in the possession of the government, the motion in that case could not validly seek the return of copies since, by voluntary arrangement and with court approval, the parties "permitted the government first to make copies of what it deemed relevant." 346 F.2d at 177. (Emphasis supplied.)

The instant case is markedly different from Hill

since there was never any voluntary arrangement which permitted the government to copy appellants' records.

Appellees contend that since appellants' original books and records have been returned they should not complain merely because copies have been made thereof by appellees. If this position is accepted it would mean that government agents would be free to break into a person's home without a valid warrant while he is absent and photocopy his records without removing them from the premises. If this conclusion is not patently wrong, search warrants will become a thing of the past. It must follow, especially since under section 1732 of Title 28 of the United States Code, photocopies are as equally admissible as originals, that copies of appellants' records are as much their property as the originals from which they were produced.

Zamaroni v. Philpott, 346 F.2d 365 (7th Cir. 1965), and Kennedy v. Coyle, 352 F.2d 867 (7th Cir. 1965), cited by appellees at p. 24, footnote 6 are totally inapplicable since they are concerned solely with judicial interference in civil adminstrative procedures.

Therefore, since there is no prosecution in esse and since appellants are seeking the return of property, not only is the philosophy of DiBella clearly met, but this Court's interpretation of DiBella as set forth in Hill is likewise satisfied.

It is further significant to note that had

appellants refused to produce the books and records requested and the government proceeded in accordance with section 7602 of the Internal Revenue Code of 1954, as amended, appellants could have appealed from a District Court's enforcement of the subpoena. Rule 81(a)(3), Fed. R. Civ. P.; Reisman v. Caplin, supra. The right to appeal should not be lost merely because of such a formal distinction.

II

SUBPOENAS DUCES TECUM

Appellees' argument supporting the District Court's granting of appellees' motion to quash appellants' subpoenas duces tecum is founded upon two alternative theories. First, appellees argue that the granting of the subpoenas would have violated the mandate of Rule 16(b) of the Federal Rules of Criminal Procedure, and second, that the subpoenas constituted a mere "fishing expedition" which would have produced no relevant evidence. (Appellees' Brief 38-40).

A. Enforcement of Subpoenas Duces Tecum In An Action Commenced Prior To Indictment Is Governed By The Federal Rules of Civil Procedure.

Since all of the proceedings in the District Court in this matter occurred prior to the obtaining of an indictment, the Federal Rules of Criminal Procedure are wholly inapplicable. Rather, the Federal Rules of Civil

Procedure govern all aspects of the proceeding below, including enforcement of subpoenas. In Russo v. United States, 241 F.2d 285 (2d Cir. 1957), the Court stated:

> "Having been filed before indictment, this proceeding [referring to a proceeding pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure] is an independent civil proceeding and not merely preliminary to a criminal action." 241 F.2d at 287-88. (Emphasis supplied.)

See also Lapides v. United States, supra; Weldon v. United States, supra. In Greene v. United States, 296 F.2d 841 (2d Cir. 1961), vacated and remanded on other grounds, 369 U.S. 403, the Court stated, in footnote 1, that:

> "Presumably proceedings under Rule 41(e) are governed by the Federal Rules of Civil Procedure where, as here, no prosecution has yet begun."

As set forth above, under the standards of DiBella there is no prosecution in esse to this date.

Consequently, Rule 16(b) of the Federal Rules of Criminal Procedure is wholly inapplicable.

B. The Subpoenas Comply With The Federal Rules Of Civil Procedure And Should Be Enforced.

The appropriate standard to be utilized in determining whether these subpoenas should be enforced is

Rule 45(b) of the Federal Rules of Civil Procedure. This rule permits the quashing or modification of the subpoenas only if they are "unreasonable and oppressive". That these subpoenas were not unreasonable nor oppressive, but rather were highly relevant and critical to appellants' case, was demonstrated in Appellants' Opening Brief, pages 14-21. Appellees' contention that the subpoenas constitute nothing more than a mere "fishing expedition" is negated by the limited and non-substantive matters sought. Nowhere do appellants seek to ascertain the extent of information in the hands of the government agents relating to any alleged inaccuracies of appellants' tax returns. The subpoenas request only non-substantive reports and other documents which would be highly instrumental in allowing appellants to demonstrate that the required admonition of constitutional rights was not given and that actual fraud and deceit was utilized by the agents in securing the books, records and other documents of appellants. In addition, it is believed that the material sought will impeach the testimony of the agents.

Since appellants admit that fraud and deception constitutes sufficient grounds for the suppression of all books, records and other documents obtained (appellees' brief, page 31), the subpoenas should be enforced regardless of this Court's decision as to any of the constitutional issues before it.

III

CONSTITUTIONAL RIGHTS ATTACH AT THE COMMENCEMENT OF A CRIMINAL TAX INVESTIGATION

Appellants devoted a major portion of their opening brief to an analysis of the application of certain constitutional rights to criminal tax investigations, with special emphasis upon the application of Supreme Court's recent decision of Miranda v. Arizona, 384 U.S. 436 (1966) and its underlying philosophy. Logically and rationally it cannot be seriously urged today that the constitutional guarantees of the Fourth, Fifth and Sixth Amendments do not attach at the commencement of a criminal tax investigation. If they do not so attach then taxpayers as a class will be denied rights now guaranteed to all others.

In support of the proposition that in the absence of fraud and deception a special agent is not required to admonish the taxpayer as to his constitutional rights under the Fifth and Sixth Amendments, appellees merely cite, without discussion, eight decisions of various courts, seven of which were decided prior to the Supreme Court's decision in Escobedo v. Illinois, 378 U.S. 478 (1964), and all of which were decided prior to the Supreme Court's decision in Miranda. A careful review of these authorities demonstrates not only their inapplicability to the facts of this case, but further that the bases of these cases, in light of Miranda, are now clearly erroneous.

In all of these eight cases, the only requirement which had to be satisfied prior to inculpatory statements being deemed admissible was whether such statements were voluntary. Miranda has completely obliterated this limited test and has set forth entirely new standards which, due to the widespread misconception of the distinction between a revenue agent and a special agent, must be applicable to tax investigations. A special agent is purely a criminal investigator, United States v. Silverstein, 314 F.2d 789, 790 (1963); Russo v. United States, supra, and should be required to meet all of the standards imposed by Miranda on other criminal investigators.

IV

THE CORPORATE BOOKS AND RECORDS ARE PROTECTED BY THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION

A substantial portion of appellees' brief is devoted to the proposition that the corporate books and records and copies of such books and records are not within the scope of the Fifth Amendment and therefore, need not be returned or suppressed. In advancing this argument, appellees overlook the fact that appellants have consistently maintained that the books and records of appellants were obtained by the government agents through the employment of a massive scheme of fraud and deceit and that the Fourth Amendment, with its prohibition against unreasonable searches and seizures, has thus been violated. The

protection of the Fourth Amendment extends to corporations. Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920

In attempting to argue against the applicability of the Fifth Amendment to corporate books and records, appellees have cited three cases. Wilson v. United States, 221 U.S. 361 (1910); Wheeler v. United States, 226 U.S. 478 (1912); and United States v. White, 322 U.S. 694 (1944). These three cases, the most recent having been decided more than twenty-two years ago, do not reflect the trend of recent Supreme Court decisions which expand and define the protection of the Fifth Amendment. See, e.g., Miranda v. Arizona, supra; Murphy v. Water Front Commission, 378 U.S. 52 (1964). Additionally, these cases cited by appellees involved the application of the Fifth Amendment to the books and records and other documents of large corporations or labor unions whose membership numbered in the thousands.

In the instant case, the appellant corporations had but one stockholder. Since, by liquidating these corporations Mr. Goodman could have operated his businesses as sole proprietorships, it seems paradoxical that he should be deemed to have lost his Fifth Amendment rights by choosing not to liquidate--a purely business decision. If choosing to operate in corporate form is deemed to deprive an individual of his Fifth Amendment privileges, it will constitute an unwarranted backward step from the philosophy of Miranda.

V

SUMMARY OF APPELLANTS' ARGUMENTS

Appellants' first argument is that the subpoenas duces tecum complied with Rule 45(b) of the Federal Rules of Civil Procedure and should have been enforced. Not only were the subpoenas reasonable in scope and not oppressive but the material sought by them was critical to the proving of appellants' case. Appellees' only arguments in support of the District Court's quashing of the subpoenas duces tecum were based upon the Federal Rules of Criminal Procedure which are wholly inapplicable.

Appellants' second argument was that appellants' books, records and other documents were obtained by a massive scheme of fraud and deceit perpetrated by the government agents. In addition to the usual confusion in taxpayers' minds about the nature of a tax investigation, this investigation originally commenced as a criminal investigation of a third party. The investigation subsequently altered its course so that it included appellants as subjects, and again was purely a criminal investigation from the outset. Within this framework, the agents purposefully and intentionally undertook a scheme of deception which capitalized upon appellants' confusion. They deliberately avoided making a meaningful explantion of their function (criminal investigators) or disclosing who was the subject of the investigation at any given time.

By explaining their function in a legalistic rather than in a meaningful fashion, they deliberately compounded appellants' confusion and uncertainty. They added to this confusion with the document receipts. If it is determined that the agents' conduct amounts to fraud or deceit, then all of the material obtained and copies thereof must be returned to appellants and its use must be suppressed in any future criminal proceedings.

Appellants' third argument was that the findings of fact and conclusions of law were clearly erroneous. The findings of fact are based entirely upon the unsupported oral testimony of the government agents, which testimony was significantly controverted by the testimony of Mr. Goodman, third party witnesses and appellees' own documents. Since the appellees had the burden to establish by clear and positive evidence that appellants' knowingly and intelligently waived their constitutional rights, the demonstrably false testimony of the government agents falls far short of satisfying this requirement. Accordingly, the findings of fact and conclusions of law are clearly erroneous and should be set aside.

Lastly, appellants argue that even if it is determined that the government agents were not guilty of fraud and deceit, all of the books and records obtained must nevertheless be suppressed as evidence in any future criminal proceeding and all copies thereof must be returned

to appellants. Taxpayers have the same rights as others with respect to constitutional immunities and privileges. If these rights are to be meaningful they must be available when they are most critically needed and not when the investigation has concluded. Under the appellees' approach, these rights do not become available until the investigation has been concluded and, in effect, the prosecution's case is perfected. If this position is approved by this Court then appellants' rights and the rights of all taxpayers become a very hollow thing indeed.

Even if considered in a light most favorable to appellees, there can be no doubt that the criminal investigation of Mr. Goodman commenced no later than December 18, 1964. It has been conceded that he was not warned or advised in any fashion of any of his constitutional rights on this day. The entire philosophy of Miranda is that admonitions of constitutional rights must be conveyed in a fashion which is meaningful and understandable to laymen. The alleged statements made to Mr. Goodman on December 21, 1964 were ineffectual since he was unaware that the investigation was criminal in nature and, therefore if any utterances were made, they were received completely out of perspective.

However, even if it should be determined that warnings were given on December 21, 1964 and that these warnings complied with the requirements of Miranda, they

could not rectify the wrong which occurred on December 18, 1964 since, as was recently put in a very recent case, once Mr. Goodman "let the cat out of the bag," he suffered under the psychological and practical disadvantages of having done so. He can "never get the cat back in the bag". See People v. Falk, ___ Cal. App. 2d ___(D.C.A. 2d August 22, 1966).

Since all of appellants' books, records and other documents were given without an adequate understanding of the applicable constitutional rights, any waiver of such rights was unknowing and unintelligent. Accordingly, all such material and copies thereof must be returned and its use suppressed in any future proceedings.

CONCLUSION

Appellants respectfully submit that the District Court erred in granting appellees motion to quash appellants' subpoenas duces tecum and that this case should be remanded to the District Court with instructions that the subpoenas be honored and further proceedings be held.

Appellants further submit that the Judgment of the District Court is erroneous and should be reversed and that this Court determine that all of appellants' books, records and memoranda were obtained in violation of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, that all such material be suppressed as evidence in all future proceedings, and that all such

material and all copies thereof be returned to appellants.

Respectfully submitted,

GOODSON AND HANNAM

By _____
Walter S. Weiss

By _____
Melvyn Mason

Counsel for Appellants

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
Walter S. Weiss